Circuit Court for Anne Arundel County
Case No. C-02-CR-20-000905

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 936

September Term, 2021

MOISES B.

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Zic,

JJ.

Opinion by Zic, J.

Filed: December 9, 2022

In 2017, the General Assembly amended the laws governing rape and sexual offense by broadening the definition of the actus reus of rape beyond its common law definition to include a number of acts (such as anal penetration, analingus, cunnilingus, and fellatio) that previously had been defined as the actus rei of sexual offenses other than rape. Md. H.B. 647 (April 18, 2017). A presumably unintended consequence of that sweeping redefinition is the possibility of ambiguity underlying verdicts involving rape and related sexual offenses, which potentially could require merger of convictions, where such an outcome previously would have been impossible. This appeal presents such an issue.

Moises B.[1] ("Mr. B."), appellant, was charged in a five-count indictment with sexual abuse of a minor, rape in the second degree, sexual offense in the third degree, sexual offense in the fourth degree, and assault in the second degree. A jury sitting in the Circuit Court for Anne Arundel County found Mr. B. guilty of all charges at the end of a two-day trial, and the court imposed the following sentences: 25 years' imprisonment for sexual abuse of a minor (Count 1); 20 years' imprisonment, all suspended, for second-degree rape (Count 2), consecutive to the sentence for Count 1; 10 years'

[1] "To protect the victim's identity, we refer to her by an initial that has no connection to her name. For the same reason, we identify her [step]father using only the first initial in his last name." *Juan Pablo B. v. State*, 252 Md. App. 624, 629 n.3 (2021), *cert. granted*, 477 Md. 150 (2022). *Juan Pablo B.* was recently heard by the Court of Appeals as *State v. Bustillo*, where the Court chose not to abbreviate the defendant's name despite his relationship to the victim. *State v. Bustillo*, 480 Md. 650, 655 (2022).

We further identify the victim's mother by a different name that has no connection to her name.

imprisonment for third-degree sexual offense (Count 3), consecutive to the sentence for Count 1; and 10 years' imprisonment, all suspended, for second-degree assault (Count 5), consecutive to the sentences for Counts 1 and 3, to be followed by five years' supervised probation. Count 4, fourth-degree sexual offense, was merged into Count 3 for sentencing purposes.

This appeal ensued, presenting a single issue:[2] whether the circuit court erred in imposing separate sentences for third-degree sexual offense and second-degree assault because of factual ambiguity in the record. For the reasons explained below, we vacate the sentence for third-degree sexual offense and second-degree assault and remand for resentencing.

BACKGROUND[3]

At approximately 11:00 p.m. on the night of July 24, 2020, the victim, V., then twelve years old, locked her bedroom door and went to sleep. She later awoke to find that her stepfather, Mr. B., was "touching" her. According to V., Mr. B. "was putting his penis inside [her] vagina and then he got into a point where he started licking [her]." Subsequently, her "vagina started burning." While Mr. B. was assaulting her, he spread

[2] Mr. B phrased the issue as follows: Did the circuit court err in ordering separate sentences for third-degree sexual offense and second-degree assault?

[3] We must set forth voluminous excerpts from the record because the issue raised requires that we determine whether it is "readily apparent" that the jury based its verdicts on the same or separate acts. *Brooks v. State*, 439 Md. 698, 739 (2014).

her legs apart with his hands because she was "kicking him." Finally, Mr. B. left through a window.[4]

V. immediately went to her mother's bedroom and "started freaking out" and "telling her what" had happened. V. and her mother ("Mother") went to V.'s bedroom as they spoke to one another. Meanwhile, Mr. B. returned from outside and entered V.'s bedroom, claiming that he had lost his wallet and keys. Mother confronted him, declaring, according to V., that if he were "not guilty" he should stay, and Mr. B. "decided to stay."

Mother stated that she returned home from work on the night of the incident at approximately 7:00 p.m. She and Mr. B. had an argument, and he decided to sleep in the living room. Mother remained in her bedroom and went to sleep at approximately 11:00 p.m. Later, Mother was awakened by "the screams of [her] daughter," and then she observed Mr. B. "com[ing] up the stairs." Mother "took [V.] back to her room" and talked with her out of Mr. B.'s presence. Mother then left V. alone in her bedroom, closing the door as she left, and told V. "not to do anything or touch anything, to stay seated." Shortly thereafter, Mother notified the police. Then, Mother returned to her bedroom to get dressed. While doing so, she looked out the bathroom window and observed Mr. B. placing a yellow ladder "under the back entry way steps."

[4] V.'s bedroom was on the second floor of a duplex where the family resided.

V. was transported to Baltimore Washington Medical Center, where a SAFE[5] nurse performed an exam. During the interview with the SAFE nurse, V. stated that Mr. B. had placed "his penis . . . in her vagina" and "that his mouth was on her vagina." During the Medical Forensic exam, the SAFE nurse observed "very fresh" tearing of tissue in V.'s perianal region. V. told the nurse that she had experienced pain at a level of "eight out of ten" while Mr. B. was inserting his penis into her vagina.

Subsequently, swabs obtained from V.'s rape kit were subjected to forensic analysis, and a mixture of V.'s and Mr. B.'s DNA was detected on a swab taken from V.'s external genitalia. Meanwhile, Mr. B. had been arrested, and a penile swab obtained from him shortly afterward was analyzed. A mixture of Mr. B.'s and V.'s DNA was detected on that swab.

A five-count indictment was returned by the Grand Jury for Anne Arundel County, charging Mr. B. with sexual abuse of a minor, rape in the second degree, sexual offense in the third degree, sexual offense in the fourth degree, and assault in the second degree. The matter proceeded to a two-day jury trial in the Circuit Court for Anne Arundel County.

The counts of the indictment charging second-degree rape and third-degree sexual offense (Counts 2 and 3) employed the statutory short-form language, prescribed in Criminal Law Article § 3-317, without specifying the particular acts on which the charges were based. Count 5, which charged second-degree assault, similarly stated that "the

[5] "SAFE" is an acronym that stands for "Sexual Assault Forensic Examination." *State v. Miller*, 475 Md. 263, 265 (2021).

aforesaid defendant on or about the aforesaid date, did assault [V.] in the second degree," without specifying the particular acts on which that charge was based.

During opening statement, the prosecutor stated:

> 12-year-old [V.] slept with her bedroom door locked. It was something that she had come accustomed to. So on the night of July 24th of 2020 when she went to bed, she locked her door. But that did not prevent this man, her stepfather, the Defendant, from climbing into her bedroom window in the middle of the night using a ladder and raping her before disappearing back out the window.
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> The witnesses will tell you that and evidence will tell you that. The SAFE nurse will tell you that. And the DNA will tell you that. On July 25th of 2020, the Defendant raped his stepdaughter, [V.] But I am getting ahead of myself. When [V.] was five or six years old, she lived with her mom, [Mother]. You will hear from [Mother], she will take the stand as well as [V.]
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> When she was about five or six years old, and living with her mother, her mother brought home a man. Her mother brought home this man. The Defendant. So from the age of five or six, onward, to [V.], this man was Papi, Daddy, her stepfather. The man who should have been protecting her. [V.] will tell you that on the morning of July 25th of 2020, she woke out of a sound sleep to pain and burning.
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> And she will also tell you that the source of that pain and burning was the Defendant on top of her with his penis in her vagina. She will tell you that she fought him off, that he threatened her silence with the fact that he wouldn't buy any delights for her room if she made noise. She was 12 and having delights were important to her.
>
> She will tell you and describe to you what he was doing with his hands as he was raping her, what he was doing with his mouth as he was raping her. What he said and what he did. He finally got off of her because she said she kept fighting him. And he escaped back out the window from where he came.

[V.] immediately left the room and immediately screamed for her mother who was sleeping down the hall and immediately disclosed. And by 3:00 that morning, little [V.] was at Baltimore Washington Medical Center having to undergo a sexual assault forensic examination because of what this man did to her.

And you will hear from our forensic examiner, our nurse Jody Oslund, and she will talk to you about the forensic exam that she did on [V.] And she will tell you about the swabs that she took from her in an effort to [find] DNA evidence, because after all, this was a fresh attack and this was a[n] --- immediate disclosure.

So Nurse Oslund will tell you that in her mind, she thought this was prompt, the chances of finding evidence is very high. And she was right. Her instincts were spot on. She will also tell you that during the course of that exam, she did what was called a butterfly -- for lack of a better term, a butterfly examination of this child and checked her genital region for injuries.

And lo and behold this poor child had fresh tears in her [perianal] area, which is the area between the vagina and the anus. Nurse Oslund will tell you that they were fresh and they are indicative of trauma. She will tell you that it is consistent with a penis being forcefully inserted in that child's vagina.

And when I tell you that Nurse Oslund's instincts were spot on, I can tell you for certainty it had --- while [V.] was at BWMC enduring her sex assault forensic exam because of the Defendant, the Defendant himself was at headquarters. Police headquarters being questioned. And part of their examination of him was to take a swab of his penis. Why? You might ask. Well to see if there was any DNA of the child on his penis.

And again, lo and behold, you are going to hear from our DNA examiner who will say that not only was the Defendant['s] DNA found on [V.'s] vagina, but [V.'s] DNA was found on this man's penis. You will hear numbers in the

> septillions, which I --- or the billions that it potentially could have been someone else. There is no doubt that those samples are accurate and correct.
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> So on July 25th, 2020, [V.] experienced something at the hands of her stepfather that no child should ever have to endure or experience. She will tell you, [Mother] will tell you because [Mother] saw the Defendant after [V.] ran screaming to her room, she looked out her back bedroom window and saw the Defendant going around the back of the house with a ladder.
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> So [V.] will tell you that he is guilty. [Mother] will tell you that he is guilty. Nurse Jody Oslund's examination and that scientific and forensic evidence will tell you that he is guilty. And the DNA is going to tell you [un]equivocally that he is guilty. So there is only one thing missing. At the end of this case, we are going to ask you to tell him too. Thank you.

After the State had concluded its case-in-chief and Mr. B. had testified on his own behalf, the court delivered jury instructions. In relevant part, the court instructed the jury on the elements of the crimes charged as follows:[6]

> The Defendant is charged with the crime of second degree rape. In order to convict [] the Defendant of second degree rape, the State must prove that the Defendant had vaginal intercourse, cunnilingus, or unlawful penetration with [V.], that the act was committed by force or threat of force, and that the act was committed without the consent of [V.].
>
> [Definitions of vaginal intercourse, cunnilingus, and unlawful penetration.]
>
> * * *
>
> Alternatively, the State must prove that Defendant had vaginal intercourse, cunnilingus, or unlawful penetration with

[6] The court also provided the jury written instructions that were consistent with the oral instructions given in open court.

> [V.], that [V.] was under 14 years-of-age at the time of the act, and that the Defendant was then at least four years older than [V.]
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> The Defendant is charged with the crime of third degree sex offense. In order to convict the Defendant of third degree sex offense, the State must prove . . . that the Defendant had sexual contact with [V.], that the sexual contact was made against the will and without the consent of [V.], and that the Defendant inflicted disfigurement or serious bodily harm against [V.] in the course of committing the offense, or threatened or placed [V.] in reasonable fear that [V.] would be imminently subject to disfigurement or serious physical injury. Alternatively, the State must prove that the Defendant had sexual contact with [V.], that [V.] was under the age of 14 at the time of the act, and the Defendant is at least four years older than [V.].
>
> Sexual contact means the intentional touching of [V.'s] genital or anal area, [or] other intimate parts, for the purpose of sexual arousal or gratification, or if the abuse of either party. It does not include acts commonly expressive of familial or friendly affection, or asked for accepted medical purposes.
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> * * *
>
> The Defendant is charged with the crime of assault. Assault is causing offensive physical contact to another person. In order to convict the Defendant of assault, the State must prove that the Defendant caused an offensive physical contact with or physical harm to [V.], that the contact was . . . the result of an intentional or reckless act of the Defendant, and was not accidental, and that the contact was not consented to by [V.]

During closing argument, the prosecutor explained:

> But what did [V.] tell you? [V.] told us that this guy is her step-dad, that on July 24th of 2020, she went to bed around 11 o'clock. She locked her door. She was very clear about that. She had become accustomed to locking her door. She went to sleep pretty quickly. She woke up to burning and

pain in her vagina, and the Defendant, her step-father, on top of her, with his penis in her vagina. That is rape; 12 year-old [V.], and her 37-year-old step-father. And if that wasn't bad enough, he held her down so that she couldn't kick him and try to get him off of her.

How do we know that that happened? Well, we know that it happened. It is uncontroverted. We know that it happened because Jody Oslund, an expert in forensic nursing, told us so. Not only did [V.] tell her what happened, consistent with what she testified here in court before you, but this Defendant left evidence of himself behind. He left a lot of evidence behind, didn't he?

He not only left tears to her vaginal area, but he left his signature calling card; he left his DNA behind. There is no doubt in this case. You know, despite the fact that the Defendant would have you believe that he walked into her room that night, she had not locked the door, and he raced from the room and out the window, diving out the window because his wife -- he was afraid his wife would catch him in the bedroom with [V.]

You know, when he said, I thought to myself, "You know, that's probably the truest thing this guy ever said." That he raced out the window, because he didn't want his wife catching him in the room with [V.], because [V.] was making too much noise. Probably the truest thing he said to you today.

But what else did the child tell you? She told you that he licked her vagina. That is a third degree sex offense. He licked her vagina. Now, I don't know why he did it. You know, maybe the pain and the burning, maybe there wasn't enough lubrication, and may he thought he would lick her vagina to see if maybe it would make it easier for him to penetrate her easier. But what did she also say, that when she went back -- when he went down there again to do it a second time, she was able to fight him off. She is a courageous girl, [V.]

After deliberating for approximately one hour, the jury found Mr. B. guilty of sexual abuse of a minor, rape in the second degree, sexual offense in the third degree, sexual offense in the fourth degree, and assault in the second degree. Neither the pronouncement of the verdict, nor the verdict sheet, indicated which offenses were based upon which acts. The court then imposed the following sentences: 25 years' imprisonment for sexual abuse of a minor (Count 1); 20 years' imprisonment, all suspended, for second-degree rape (Count 2), consecutive to the sentence for Count 1; 10 years' imprisonment for third-degree sexual offense (Count 3), consecutive to the sentence for Count 1; and 10 years' imprisonment, all suspended, for second-degree assault (Count 5), consecutive to the sentences for Counts 1 and 3, to be followed by five years' supervised probation. Count 4, fourth-degree sexual offense, was merged into Count 3 for sentencing purposes.

DISCUSSION

I. PRESERVATION

The State argues that Mr. B.'s claims were waived because he failed to object that the indictment was ambiguous, he failed to object to "the jury's verdict as being ambiguous," and he did not claim that the convictions were based upon the same acts during sentencing. Mr. B, in reply, argues that failure to merge sentences constitutes an illegal sentence, which a defendant may challenge at any time despite, for example, failure to object to an ambiguous indictment or jury verdict, or failure to object at sentencing.

We reject the State's non-preservation argument. The failure to merge convictions for sentencing purposes where required under either the required evidence test or the rule of lenity results in an illegal sentence within the meaning of Maryland Rule 4-345(a). *Pair v. State*, 202 Md. App. 617, 624-25 (2011), *cert. denied*, 425 Md. 397 (2012). A claim that a sentence is inherently illegal within the meaning of Rule 4-345(a) is not subject to waiver or non-preservation. *Chaney v. State*, 397 Md. 460, 466 (2007). We therefore turn to the merits of Mr. B.'s appeal.

II. MERGER

Whether two convictions should merge for sentencing purposes is a question of law, so we review it de novo. *Clark v. State*, 473 Md. 607, 616 (2021).

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. V. That provision, applicable to the states under the Due Process Clause of the Fourteenth Amendment,[7] prohibits, among other things, imposing multiple punishments for the same offense unless "it is clearly the intent of the legislature to do so." *State v. Frazier*, 469 Md. 627, 641 (2020) (citations and quotation omitted). "Merger is the common law principle that derives from the protections afforded by the Double Jeopardy Clause." *Id.* It "protects a convicted

[7] *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (holding "the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment").

defendant from multiple punishments for the same offense." *Brooks v. State*, 439 Md. 698, 737 (2014) (citation omitted).

The "principal test for determining the identity of offenses" for purposes of merger "is the required evidence test." *Coleman v. State*, 237 Md. App. 83, 99 (2018) (citations and quotation omitted). Two conditions are necessary for merger under the required evidence test: (1) the offenses at issue must be the "same," and (2) they must be based upon the same act or acts.[8] *Frazier*, 469 Md. at 641; *Brooks*, 439 Md. at 737.

Generally, two offenses are the "same" for double jeopardy purposes if, when the elements of each offense are compared to each other, only one offense has additional, distinct elements. *Frazier*, 469 Md. at 644; *Nicolas v. State*, 426 Md. 385, 401 (2012). When that condition is satisfied, the lesser included offense (the offense comprising fewer elements) is subsumed within the greater offense, and a sentence may be imposed only for the greater offense, regardless of the statutory maxima for the offenses.[9] *Frazier*, 469 Md. at 646-47.

[8] If two offenses are based upon the same act or acts but are not the same under the required evidence test, they may, nonetheless, merge under the rule of lenity or under the principle of fundamental fairness. *Carroll v. State*, 428 Md. 679, 693-94 (2012); *Coleman*, 237 Md. App. at 99. Under those alternative grounds for merger, the offense carrying the lesser maximum penalty merges into the offense carrying the greater maximum penalty. *Brooks*, 439 Md. at 737.

[9] The only exception to this rule, which is not applicable here, is where the legislature has expressly authorized multiple punishments for two offenses that otherwise constitute the "same" offense for double jeopardy purposes. *Missouri v. Hunter*, 459 U.S. 359, 365-69 (1983); *Frazier*, 469 Md. at 641.

In determining whether two offenses are based upon the same or different acts, we construe an ambiguous record in favor of the defendant. *Id.* at 642. Thus, "when the factual basis for a jury's verdict is not readily apparent, the court resolves factual ambiguities in the defendant's favor and merges the convictions if those convictions also satisfy the required evidence test." *Brooks*, 439 Md. at 739 (citations omitted); *Cooper v. State*, 128 Md. App. 257, 265 (1999), *superseded by statute*, 2002 Md. Laws Vol I, Ch. 26 (pp. 197-1095) (merging convictions of assault and resisting arrest because there was only one use of force so both convictions were necessarily based upon the same acts); *Nightingale v. State*, 312 Md. 699, 708 (1988) (merging convictions of sexual offense and sexual child abuse because, although there were multiple sexual contacts, the general verdict and record did not allow the Court to find convictions were in fact founded on separate conduct).

A. Because Third-Degree Sexual Offense and Second-Degree Rape Are the "Same Offense" when Based Upon the Same Acts, and Because We Resolve Ambiguity in Favor of the Defendant, Mr. B's Conviction for Third-Degree Sexual Offense Must Merge with the Conviction for Second-Degree Rape for Sentencing Purposes.

Mr. B. asserts that, given the amendments to the sexual assault statutes effective October 1, 2017, it is now possible to commit second-degree rape by either forced vaginal intercourse or forced cunnilingus, whereas, prior to that date, the latter conduct was not included in the definition. Moreover, relying upon *Partain v. State*, he contends that forced cunnilingus can be both a "sexual contact" and a "sexual act," so it is possible to commit a third-degree sexual offense by forced cunnilingus. 63 Md. App. 260, 267-68 (1985), *cert. denied*, 304 Md. 299 (1985). Therefore, Mr. B. concludes, second-degree

rape and third-degree sexual offense can be the "same" offense for purposes of merger if based upon the same acts. Because, according to Mr. B., "the record is ambiguous as to whether or not the convictions for second-degree rape and third-degree sexual offense were predicated upon the same or different acts," "the sentence for third-degree sexual offense must merge into the sentence for second-degree rape."

The State, however, contends that the "second-degree rape and the third-degree sexual offense convictions were based on separate acts," and, therefore, merger is not required. The State also asks that, if we conclude that third-degree sexual offense merges into second-degree rape, we exercise our discretion under *Twigg v. State*, 447 Md. 1 (2016), to vacate all the sentences and remand for resentencing.

1. Third-Degree Sexual Offense and Second-Degree Rape Are the "Same" Offense under the Age-Difference Modality.

Prior to October 1, 2017, rape had always been defined as the penetration, however slight, of the victim's vagina by the defendant's penis, by force or threat of force and without the victim's consent. *See, e.g.*, Md. Code Ann., Crim. Law §§ 3-303(a)(1), 3-304(a) (2002, 2021 Repl. Vol., Supp. 2016) (respectively, first- and second-degree rape statutes, prohibiting "vaginal intercourse"); *State v. Baby*, 404 Md. 220, 262-63 (2008) (citing the then-extant version of Maryland Criminal Pattern Jury Instruction, Section 4:29). Statutory sexual offenses and rape in any degree were mutually exclusive because the actus rei for sexual offenses expressly excluded vaginal penetration. *See, e.g.*, Crim. Law §§ 3-305, 3-306 (2002, 2021 Repl. Vol., Supp. 2016) (respectively, first- and second-degree sexual offense statutes, prohibiting "sexual act," which then was defined

in Criminal Law § 3-301(d)(2)(i) as expressly excluding "vaginal intercourse"); *Paige v. State*, 222 Md. App. 190, 208-09 (2015) (observing that, under the then-extant statutory scheme, "the plain language of the sexual offense statute expressly exclude[d] penile penetration as a form of 'sexual contact'" and that no "reasonable jury, having been correctly instructed in accordance with the law, could have convicted an individual of both rape and a third-degree sexual offense based upon the same act"). That distinction, however, has been blurred by the 2017 statutory amendments.

In determining whether third-degree sexual offense and second-degree rape are the same offense under the required evidence test, we must account for the fact that the statutes defining those offenses are multi-purpose criminal statutes, "embracing different matters in the disjunctive." *Hallowell v. State*, 235 Md. App. 484, 508 (2018) (quoting *State v. Ferrell*, 313 Md. 291, 298 (1988)). "When applying the required evidence test to multi-purpose offenses, *i.e.*, offenses having alternative elements, a court must examine the alternative elements relevant to the case at issue." *Frazier*, 469 Md. at 644 (citation and quotation omitted) (cleaned up). In other words, in applying the required evidence test, we treat a multi-purpose statute as we "would treat separate statutes." *Twigg*, 447 Md. at 14 (quoting *Nightingale*, 312 Md. at 706, *superseded by statute*, 1990 Md. Laws Vol. V, Ch. 604 (pp. 2636-38)). Here, that requires us to examine the jury instructions. *Snowden v. State*, 321 Md. 612, 619 (1991) (suggesting jury instructions could illuminate the rationale behind a verdict).

The jury was instructed on two distinct modalities of third-degree sexual offense,[10] one of which was based upon inflicting disfigurement or serious physical injury (or the threat thereof) on the victim, and the other of which was based upon age difference and the victim's status as a child younger than fourteen. Crim. Law § 3-307(a)(1), (3) (2020) For the first modality, the elements of third-degree sexual offense are: (1) that the defendant had "sexual contact" with the victim; (2) that the sexual contact was against the will and without the consent of the victim; and (3) that the defendant inflicted disfigurement or serious physical injury (or the threat thereof) on the victim.[11] Crim.

[10] The number of modalities is subject to more than one interpretation. For ease of exposition, we are considering the threat of disfigurement or serious physical injury to be no different than actual disfigurement or physical injury. This difference in interpretation is immaterial to the merger issue in this case, which turns on ambiguity concerning the sexual contact that is the underlying basis for the offenses.

[11] In general, the force element in the third-degree sexual offense statute encompasses much more than what was spelled out in the jury instructions. Crim. Law § 3-307. It provides in pertinent part:

> (a) A person may not:
>
> > (1) (i) engage in sexual contact with another without the consent of the other; and
> >
> > (ii) 1. employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
> >
> > 2. suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;
> >
> > 3. threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
> >
> > 4. commit the crime while aided and abetted by another[.]

Law § 3-307(a)(1)(i), (a)(1)(ii)(2)-(3) (2002, 2021 Repl. Vol., Supp. 2020). For the second modality, the elements are: (1) that the defendant had "sexual contact" with the victim; (2) that the victim was under fourteen years old at the time of the act; and (3) that the defendant is at least four years older than the victim. Crim. Law § 3-307(a)(3) (2002, 2021 Repl. Vol., Supp. 2020). "Sexual contact" means "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party," but it "does not include" either "a common expression of familial or friendly affection" or "an act for an accepted medical purpose." Crim. Law § 3-301(e)(1), (2) (2002, 2021 Repl. Vol., Supp. 2020).

As for second-degree rape, the jury was also instructed on two modalities: one based upon force or the threat of force against the victim, and the other based upon age difference and the victim's status as a child younger than fourteen. Crim. Law § 3-307(a)(1), (3) (2020). For the first modality, the elements of second-degree rape are: (1) that the defendant had vaginal intercourse, cunnilingus, or unlawful penetration with the victim[12]; (2) that the act was committed by force or threat of force; and (3) that the act was committed without the consent of the victim. Crim. Law § 3-304(a)(1) (2020). For the second modality, the elements are: (1) that the defendant had vaginal intercourse, cunnilingus, or unlawful penetration with the victim; (2) that the victim was under

[12] The statute prohibits "vaginal intercourse or a sexual act." Crim. Law § 3-304(a) (2002, 2021 Repl. Vol., Supp. 2020). Criminal Law § 3-301(d) defines "sexual act" as including, among other conduct, cunnilingus and anal intercourse.

fourteen years old at the time of the act; and (3) that the defendant is at least four years older than the victim. Crim. Law § 3-304(a)(3) (2020).

The elements for the modalities of third-degree sexual offense and second-degree rape based upon age difference line up perfectly with each other; they differ only in their respective sexual contacts/acts. Third-degree sexual offense based on age difference requires, more broadly than second-degree rape, that the defendant had "sexual contact" with the victim, whereas the corresponding type of second-degree rape, for purposes of this case, requires either vaginal intercourse, cunnilingus, or unlawful penetration. Crim. Law §§ 3-304(a)(1), (3), 3-307(a)(1), (3) (2002, 2021 Repl. Vol., Supp. 2020). Under Criminal Law § 3-301(e)(1), "sexual contact" may include cunnilingus. *See Partain*, 63 Md. App. at 268 (interpreting a similar definition of "sexual contact" in a predecessor statute, Art. 27, § 461(f)).[13] We conclude that, under the circumstances of this case, if based upon cunnilingus, third-degree sexual offense and second-degree rape based upon age difference are the "same" offense.

To compare the remaining modalities of third-degree sexual offense and second-degree rape, based on force or threat of force, we would further be required to decide whether their force elements are the same.[14] In the different context of evidentiary

[13] In *Partain*, we declared that "[t]here is no basis for concluding that cunnilingus cannot constitute a 'sexual contact' because it also constitutes a 'sexual act.'" *Partain*, 63 Md. App. at 268.

[14] From Mr. B.'s standpoint, it suffices to show that proof of the force element of second-degree rape always implies proof of the force element of third-degree sexual offense. *See Middleton v. State*, 238 Md. App. 295, 309 n.13 (2018).

sufficiency, we strongly suggested that they are not. *Martin v. State*, 113 Md. App. 190, 238 (1996) (observing that, "[a]lthough a third-degree sexual offense requires less than does the second-degree offense[15] in terms of the atrocity of the sexual invasion of the victim's body, it in some ways requires more by way of the violence or threat of violence employed to overcome the victim's will to resist").[16] For reasons explained below, however, we need not further consider this question.

We have established that only the age-difference modality of each offense satisfies the required evidence test. To determine whether separate sentences were proper, we must address whether it is "readily apparent" on which modalities the jury rested its verdict. *Brooks*, 439 Md. at 739. In examining the entire record in this case, we cannot say that it is "readily apparent" upon which modalities the jury based its convictions. As to each offense at issue, both modalities were charged, both were explained in the respective instructions, and there was ample evidence of both, but it is unclear from the general verdict in this case whether the jury found that Mr. B. had committed the offenses based upon age difference or otherwise. Under the rule articulated in *Brooks*, we are

[15] In *Martin v. State*, we compared second- and third-degree sexual offense. 113 Md. App. 190, 237-41 (1996). But the force element of the former crime of second-degree sexual offense was the same as that for second-degree rape. *Id.* at 239-41. *Compare* Art. 27, § 463 (1957, 1996 Repl. Vol.) (second-degree rape; "[b]y force or threat of force") *with* Art. 27, § 464A (second-degree sexual offense; same). *See also* Crim. Law § 3-306(a)(1) (2002, 2012 Repl. Vol., Supp. 2016) (recodified version of second-degree sexual offense prior to 2017 revision; "[b]y force or threat of force").

[16] In *Martin*, we observed that the first-degree sexual offense statute appeared to contain both force elements, suggesting that the force elements for second-degree and third-degree sexual offense were different and that, in any event, proof of one did not necessarily imply proof of the other. *Id.* at 239-40. We do not decide this question here.

constrained to give Mr. B. the benefit of the doubt in this respect, so we assume that the verdicts were based upon the age-difference modalities of third-degree sexual offense and second-degree rape, under §§ 3-304(a)(3) and 3-307(a)(3). 439 Md. at 739 (citing cases[17]). We therefore turn to the second prong of the analysis to consider whether it is "readily apparent" that the convictions for third-degree sexual offense and second-degree rape were based upon the same or separate acts. *Brooks*, 439 Md. at 739.

2. Because the Factual Bases for the Convictions for Third-Degree Sexual Offense and Second-Degree Rape Are Not "Readily Apparent," the Separate Sentences Were Illegal, and We Merge the Convictions.

When a jury's rationale for finding a defendant guilty of various offenses is not "readily apparent," we resolve ambiguities in favor of the defendant and the offenses must merge for sentencing purposes. *Snowden*, 321 Md. at 619; *Nicolas*, 426 Md. at 410. To determine whether the factual bases upon which the jury found Mr. B guilty of third-degree sexual offense and second-degree rape are "readily apparent," we must look at the entirety of the record, including the underlying conduct, statements by counsel or the court upon which the jury relied to render a verdict, and the verdict sheet itself. *See Snowden*, 321 Md. at 619 (analyzing elements of offenses and underlying conduct, and suggesting jury instructions could provide guidance for merger questions in jury trials). Although the courts have not specifically defined "readily apparent," their holdings provide guidance.

[17] *Nicolas*, 426 Md. at 410-13; *Snowden*, 321 Md. at 619; and *Nightingale*, 312 Md. at 708-09.

In *Brooks*, the Court of Appeals found that it was not readily apparent that the jury's guilty verdicts on false imprisonment and rape were based upon different acts, so the court held that the sentences must merge. 439 Md. at 742. In reaching this conclusion, the court looked to the verdict sheet, jury instructions, prosecutor's closing argument, and a question from the jury. *Id.* None of these sources contained a clear statement providing insight into the jury's reasoning. *Id.* The court stated, "[b]ecause the precise factual basis of the jury's conviction of Mr. Brooks of false imprisonment is not readily apparent and any factual ambiguities must be resolved in favor of the defendant, we must assume that the false imprisonment conviction was based on the same facts as the rape conviction." *Id.*

In *Nicolas*, the Court of Appeals held it was not readily apparent that the jury's guilty verdict for second-degree assault and resisting arrest were based on separate assaultive acts. 426 Md. at 411. The State presented evidence suggesting that the defendant pushed or struck the police officers before, during, and/or after they initiated arrest, but neither the evidence, charging document, jury instructions, closing arguments, nor verdict sheet provided an unambiguous indication as to whether the jury based its convictions on separate acts. *Id.* The mere fact that a jury could conclude that the defendant was guilty of second-degree assault and resisting arrest based on separate acts does not create an unambiguous record such that a court can impose separate sentences. *Id.* at 411-12; *Frazier*, 469 Md. at 642 (holding, given deficiencies in both the State's presentation of evidence and the pattern jury instructions, the record was ambiguous even

though evidence presented could allow a jury to conclude that separate instances of assault occurred).

In *Cortez v. State*, 104 Md. App. 358 (1995), this Court suggested that ambiguity could be avoided by giving an "appropriate instruction," such as, for example,

> [I]f [the jury] found the defendant guilty of robbery . . . it could find the defendant guilty of battery . . . only if it found that there was a use of force (or threat of force) separate from and independent of the force (or threat of force) employed to effect the greater offense.

Id. at 369. In the present case, the court instructed the jury as to the relevant modalities of third-degree sexual offense and second-degree rape, but it did not distinguish the offenses as suggested in *Cortez* such that the jury could find Mr. B guilty of both third-degree sexual offense and second-degree rape only if the jury concluded that separate and independent acts occurred.

In *Pair v. State*, 202 Md. App. 617 (2011), this Court also stated, "[f]or merger purposes, it is critical that we determine whether the assault was a mere incident of robbery or whether it had a life and an energizing purpose of its own." *Id.* at 628. Similarly, here, we must determine whether third-degree sexual offense was, in the jury's estimation, an incident of second-degree rape or had a life of its own. In other words, the record must allow us to conclude that the verdicts for these offenses were based on separate acts.

Third-degree sexual offense and second-degree rape can both be based on touching the victim's genital, anal, or other intimate area.[18] Unlike in *Brooks*, the present record does contain a suggestion that the jury could convict Mr. B of both third-degree sexual offense and second-degree rape on separate factual bases. 439 Md. at 742. The record does not, however, contain a clear jury instruction as recommended by the Court in *Cortez*. Based on our review of the record and available case law, we find that the prosecutor's closing argument alone is insufficient for us to conclude that it was "readily apparent" that the jury based its verdicts for third-degree sexual offense and second-degree rape on separate acts, even though the evidence presented could allow a jury to conclude separate acts occurred.[19] *Frazier*, 469 Md. at 642.

As discussed above, the court in the present case instructed the jury on two modalities of third-degree sexual offense and of second-degree rape, but the verdict sheet did not identify under which modality or upon what conduct it based its decision. The prosecutor explained during closing argument that the second-degree rape allegation was

[18] The definition of second-degree rape includes vaginal intercourse, cunnilingus, or unlawful penetration with the victim, but aspects of such conduct could also be more broadly characterized as "intentional touching of the victim's . . . genital, anal, or other intimate area," within the definition of "sexual contact." Crim. Law §§ 3-306(a)(1), 3-307, 3-301(e).

[19] *See also Lamb v. State*, 93 Md. App. 422, 469, 474-75 (1992) (holding battery merged with false imprisonment because battery was incidental to the confinement, but holding one count of assault did not merge with battery where both threat and physical contact separately occurred and were separately charged and expounded at trial); *Britton v. State*, 201 Md. App. 589, 602-04 (2011) (holding assault did not merge with resisting arrest because two entirely separate occurrences formed the basis of each charge and because the statutes have different purposes).

based upon vaginal intercourse with the victim and that the third-degree sexual offense allegation was based upon cunnilingus, but this alone is insufficient to conclude that the jury based its convictions upon separate acts. The prosecutor's closing argument is not a legal instruction upon which we may wholly rely to illuminate the jury's rationale. *Snowden*, 321 Md. at 619. Neither the indictment, the prosecutor's opening statement, the testimony, the jury instructions, nor the verdict sheet provide sufficient grounds for concluding that "the factual basis for" the jury's verdict was "readily apparent." *Brooks*, 439 Md. at 739. Because we must construe an ambiguous record in favor of the defendant, we find that the circuit court erred in imposing a separate sentence for third-degree sexual offense. Accordingly, we vacate Mr. B.'s sentence for third-degree sexual offense.

B. Under the Circumstances of this Case, the Conviction for Second-Degree Assault Must Merge for Sentencing Purposes with the Conviction for Second-Degree Rape.

Mr. B. asserts that the battery type of second-degree assault is a lesser-included offense of both third-degree sexual offense and second-degree rape. According to Mr. B., under the facts of this case, there is factual ambiguity as to whether the conviction for second-degree assault was based upon the same assaultive conduct underlying the convictions for third-degree sexual offense and second-degree rape, so second-degree assault "must merge" either into third-degree sexual offense or second-degree rape. The State concedes that if we reject its non-preservation argument, second-degree assault merges into either second-degree rape or third-degree sexual offense.

Because we hold that the conviction for third-degree sexual assault merges with second-degree rape, we now look only at whether the conviction for second-degree assault merges with second-degree rape. In *Biggus v. State*, 323 Md. 339 (1991), the Court of Appeals squarely addressed a virtually identical question and held that, when based upon the same "assaultive conduct," second-degree assault of the battery type merges into third-degree sexual offense under the required evidence test. *Id.* at 350-52. The Court further noted that "Maryland cases have consistently taken the position that, where a defendant is convicted of a sexual offense and a common law assault or battery," and where the force, threat of force, "or sexual contact involved in the sexual offense is also the basis for the assault or battery conviction, the assault or battery merges into the sexual offense under the required evidence test." *Id.* at 351 (citations omitted). This leads to the conclusion that second-degree assault merges into second-degree rape where the assaultive conduct was also the basis for the force element of second-degree rape. We therefore accept the State's concession on this point.

Moreover, it is not "readily apparent" from the indictment, prosecutor's opening statement, testimony, verdict sheet, or jury instructions whether the second-degree assault in this case was based upon the same assaultive acts as the second-degree rape, or upon separate acts. Therefore, the circuit court erred in imposing a separate sentence for second-degree assault. Accordingly, we vacate Mr. B.'s sentence for second-degree assault.

CONCLUSION

In sum, we hold that third-degree sexual offense and second-degree rape can be the "same" offense when based upon the same acts, and it is not "readily apparent" that the convictions for these offenses were based upon separate acts. Therefore, under the circumstances of this case, the circuit court erred in imposing separate sentences for third-degree sexual offense and second-degree rape. We also hold that second-degree assault can be the "same" offense as second-degree rape when the force elements for each offense are based upon the same assaultive conduct. It is not "readily apparent" that the force element for second-degree assault was based upon different acts than the force element for second-degree rape. Therefore, the circuit court erred in imposing a separate sentence for second-degree assault. This decision disturbs the trial court's intended overall sentence, and the trial court should be allowed to reconsider the overall sentence in the context of the counts that remain. Accordingly, we vacate the sentences for third-degree sexual offense and second-degree assault and remand for resentencing on sexual abuse of a minor and second-degree rape.

SENTENCE FOR THIRD-DEGREE SEXUAL OFFENSE VACATED. SENTENCE FOR ASSAULT IN THE SECOND DEGREE VACATED. REMANDED FOR RESENTENCING ON THE REMAINING COUNTS. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.